In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

FIXLER BROS., INC.,
a Corporation,
Petitioner,

vs.

THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD, CONNECTICUT,
a Corporation,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals is reported at 117 Fed. (2d) 979. It is also included in the printed record filed herewith. (Record page 29.)

The opinion of the District Judge designated "Findings by the Court and Judgment" is included in the printed record filed herewith. (Record page 19.)

No other opinions were rendered by either Court.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

These grounds have been set forth in the petition (*supra*, p. 2) and in the interest of brevity are not repeated here.

STATEMENT OF THE CASE.

The facts have been summarized in the petition. (*supra*, p. 1.) Inasmuch as the questions here presented concern more particularly whether or not the truck was left "unattended" within the meaning of paragraph 9 of the

policy, we relate facts pertaining to that subject somewhat more in detail.

Fixler Bros., Inc., an Illinois corporation, doing business in Chicago, ordered from a New York supply house six cases of linen piece goods to be shipped by motor truck operated by The Gregg Carloading & Distributing Company, an Ohio corporation with its principal office in Cleveland, Ohio, a common carrier engaged in interstate commerce.

The merchandise mentioned was loaded late in the afternoon of May 10th, 1937, from the Gregg Company dock onto one of the Gregg trucks operated by Walter C. Hanson and the truck locked and sealed. The truck was then driven away from the loading dock, the driver being instructed to return the next morning and complete the load, which was to be transported from New York to Chicago. In accordance with his usual custom, Hanson drove the sealed truck to an attended parking lot, which was surrounded on two sides by high buildings and on the other two sides by a high fence in which, on the 26th Street side, were two gates. After parking the truck he paid one of the two attendants the regular charge, turned over his keys and received a parking ticket. He then went to a hotel, spent the night there, returning to the parking lot around 7:45 o'clock the following morning. Two attendants were there, but the one to whom he had given his keys was not. The truck was missing from the parking lot and was not located until the next afternoon, when police officers found it on 50th Street. The cargo had been removed and the truck was empty.

The insurance company admitted the issuance of the policy and conceded that both Fixler Bros., Inc. and the Gregg Company had complied with the requirements of the policy insofar as notice and filing proof of loss were concerned.

Having received no reimbursement for its loss, Fixler Bros., Inc. on September 14th, 1937, commenced an action

in the Municipal Court of Chicago against the Gregg Company, serving the latter with summons at its office in Chicago. In due course, on September 28th, 1937, a general appearance was entered for the defendant, the Gregg Company, by its attorneys, Messrs. KixMiller, Barr & Morris. Notice of the action was given to the insurance company but it elected not to defend its assured, as its policy gave it the right to do. On October 19th, 1937, judgment was entered in the presence of the attorneys for the carrier in the amount of $3114.58.

On January 22nd, 1938, after the expiration of the statutory time required by the law of Ohio, the insured carrier then having been adjudged a bankrupt in Cleveland and recovery from that source being impossible, Fixler Bros., Inc., entered suit in the Court of Common Pleas of Cuyahoga County, Ohio, against the insurance company on the judgment obtained in Chicago. The suit was removed by the defendant insurance company into the United States District Court. A jury being waived the case was tried to the court.

The insurance company rested its defense solely on allegations that the Gregg Company had failed to comply with the provisions of paragraphs 8 and 9 of the policy. Paragraph 8, which covered the requirements when the cargo was "in transportation between point of shipment and destination" is not involved here because, as the District Court found, the cargo was not "in transportation within the provisions of Section 8, since the truck was only partially loaded and was not enroute between point of shipment and its destination." (Record, page 8.) The Circuit Court of Appeals did not dispute that finding.

With respect to Paragraph 9 the insurance company claimed more specifically that the truck and cargo had been left unattended so as to require it to be garaged in a substantial building. The District Court having before it the stipulation and the uncontradicted testimony of Walter C.

Hanson, that the parking lot was an attended parking lot and that attendants were present when the truck was left and when it was called for, found that there had been no violation of this provision. The Circuit Court of Appeals thought otherwise and said "The obvious purpose of clause nine, * * * was to require that at least one of the two men into whose custody the combination outfit hauling the cargo was placed should remain during its transit with the cargo, * * *." (Record p. 31.)

ERRORS INTENDED TO BE URGED.

1. The Circuit Court of Appeals erred in construing the language of the policy to require that only agents of the insured could attend the truck,—thereby eliminating attendants in parking lots,—and in placing such a construction on the language "not to be left unattended" as unwarrantedly favored the insurer which had it within its power to define unmistakably the degree of care and kind of attendants required.

2. The Circuit Court of Appeals erred in failing to apply the long-established law of Ohio and in failing to follow its own ruling and those of this Court,—that an insurance policy, containing language susceptible of two or more interpretations, is to be construed strictly against the company which prepared it and favorably to the party which had no voice in its preparation.

ARGUMENT.

I. AN INSURANCE POLICY CONTAINING LANGUAGE SUSCEPTIBLE OF TWO OR MORE CONSTRUCTIONS SHOULD BE CONSTRUED STRICTLY AGAINST THE COMPANY WHICH PREPARED IT AND FAVORABLY TO THE PERSON FOR WHOSE BENEFIT THE POLICY WAS WRITTEN AND WHO HAD NO VOICE IN ITS PREPARATION.

(a) The Tractor and Trailer Combination Was Not Left Unattended while in Transit.

The Circuit Court of Appeals confined its consideration of the case almost wholly to Paragraph 9 of the policy and in particular to the word "unattended" contained therein. Paragraph 9 of the policy is as follows:

> "9. It is warranted by the assured that in no event shall cargo being transported by any truck or trailer combination *be left unattended* while in transit except when garaged in a substantial building, such building to be properly attended in a manner which would reasonably safeguard such cargo against the risk of theft."

As to the facts bearing on this question of attendance, we quote the following from page 14 of the Stipulation attached to and made a part of the deposition of Fred Meewes and others offered in evidence by the Insurance Company (Record p. 12):

> "Said Hanson received a ticket, for which a consideration was paid, from the *attendant* at the aforementioned parking lot, and left the premises * * *. It is further stipulated that when Walter C. Hanson, the driver of the truck in question, returned to the parking lot * * * there were *two attendants* at said place."

Walter C. Hanson, the sole witness, on direct examination testified that when he parked his truck on the evening of May 10th, 1937 there were *two attendants* in charge (Record, page 15) and when he returned to his truck on the morning of May 11th, 1937, there were *two attendants* in charge. (Record, page 16.) His testimony was uncon-

tradicted. Since then, by Stipulation and uncontradicted testimony, *attendants* were at all times present, how, upon any basis of fact could any conclusion be arrived at other than that the tractor and trailer combination was "not left unattended"? The District Court which had before it all the evidence in the case so concluded. "The court, therefore, is of the opinion that the truck and cargo was not left unattended." (Record, page 9.)

(b) The Language of the Insurance Policy Was, Without Any Basis in Fact or in Law, Construed by the Circuit Court of Appeals in Favor of the Insurer.

It will be apparent to what length the Circuit Court of Appeals went in reading into this paragraph 9 a construction favorable to the insurer when the pertinent language from the opinion of the Circuit Court is placed alongside that of paragraph 9 of the policy:

POLICY:

"9. It is warranted by the assured that in no event shall cargo being transported by any truck or trailer combination *be left unattended* while in transit except when garaged in a substantial building, such building to be properly attended in a manner which would reasonably safeguard such cargo against the risk of theft."

OPINION:

"The obvious purpose of clause nine, supplementing the custody provision of the preceding clause eight, was to require that *at least one of the two men into whose custody* the combination outfit hauling the cargo was placed *should remain during its transit with the cargo,* * * *." (Record, page 31.)

(The "preceding clause eight" has reference to "when cargo is in transportation between points of shipment and destination,"—obviously inapplicable here since that "transportation" had not yet begun, as the District Court decided and the Circuit Court of Appeals did not dispute.) (Record, page 8.)

Following the foregoing quotation from its opinion the Circuit Court of Appeals refers to the case of *Ries & Sons, Inc. vs. Automobile Insurance Company,* 121 N. J. L.,

493, 3 Atl. 2d, 610, which curiously enough names the same insurance company as defendant. But how different from the language of the Ries policy is the language of the policy here involved! The Ries policy provides:

> "* * * shall at all times be in charge of two men, at least one of whom should be in attendance and guarding the truck at all times."

The insurance company which used such unmistakable language in the Ries policy here issued a policy which merely provided that the truck should "not be left unattended." Is it not to be wondered at how the Court of Appeals could arrive at a conclusion that the language of the policy was unambiguous. (Record, page 31.)

(c) The Insurer, Which Wrote the Policy, Chose the Language and Should Have Made it Unmistakable.

Returning to Paragraph 9, the language,—"In no event shall * * * be left unattended" clearly indicated that the Insurance Company neglected, or chose not, to define the degree of attendance or the number or kind of attendants required. It did not specify, as the Court of Appeals goes out of its way to do, that attendants must be agents of the assured. (Record, page 31.) The Insurance Company did not even disqualify as attendants persons such as the Court of Appeals implied to be unsuited,—designating them as "Tom, Dick or Harry," or "a colored fellow." (Record, page 31.)

It should be unnecessary for the court to be forced to imply, or the insured to speculate, as to the meaning of such vital language. Clarity can be so easily achieved. Indeed it was achieved by this very insurance company in the Ries policy.

The responsibility of the insurer has been aptly defined by this Court in *Aschenbrenner vs. U. S. Fidelity & Guaranty Company,* 292 U. S., 80, 54 Supreme Court 590:

> "The phraseology of a contract of insurance is that chosen by the insurer and the contract, in fixed form, is tendered to the prospective policyholder, who is often without technical training and who rarely accepts it with a lawyer at his elbow."

How much more applicable is this to a shipper, who is not even tendered the policy, but who entrusts his cargo to the carrier on representations that the cargo is fully insured?

II. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE LONG ESTABLISHED LAW OF OHIO, ITS OWN RULINGS AND THOSE OF THIS COURT.

The decision of the Circuit Court of Appeals is patently in conflict with the rule laid down in *Erie Railroad Company vs. Tompkins,* 304 U. S., 64, and *Ruhlin vs. New York Life Insurance Company,* 304 U. S., 202, 58 Supreme Court, 860.

In Ohio it has been for a long time the accepted rule that a contract is construed strictly against the person who prepared it and favorably to the person who had no voice in its preparation. The early case of *State of Ohio vs. Executors of Thomas Worthington,* 7 Ohio, Part 1, page 171, has been uniformly followed,—

> "In the interpretation of a contract the document is construed strictly against the person who prepared it and favorably to the person who had no voice in the selection of the language. It is presumed that one using words uses those most favorable to his interest and therefore all doubtful and ambiguous words are to be construed against him. He who speaks should speak plainly, or the other party may explain to his own advantage."

It is an accepted rule of law that insurance policies are no exception to the rules governing the construction and interpretation of contracts,—that an ambiguous contract pre-

pared by one party alone will be construed most strongly against the party preparing it. In *Williston on Contracts* under Section 621, entitled "Scope and Meaning of Contracts," at page 1788, we find the following expression of law, well fortified with citation of authority:

> "Since one who speaks or writes, can by exactness of expression more easily prevent mistakes in meaning than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter; and as he will ordinarily be the promisee of the promise in question, it is sometimes stated that the contract, if ambiguous, will be interpreted in favor of the promisee. This rule finds frequent application to policies of insurance which are ordinarily prepared solely by the insurance company and the words, therefore, are construed most strongly against it."

Of the numerous authorities cited the case of *National Surety Company vs. Mutual Veneer Company,* 66 Federal (2d) 88, is typical. This is a Circuit Court of Appeals, Sixth Circuit Court, case. At page 91 of the opinion the Court says:

> "If we conceived that we were dealing with a doubtful question * * * in the coverage of the policy, we would still be constrained to interpret it in favor of the Appellee (Mutual Veneer Co.) upon the principle that insurance policies, if ambiguous in their language, are to be construed strictly against the insurer by whom they were framed."

This same Circuit Court of Appeals for the Sixth Circuit very recently and forcefully reiterated the rule in *Fidelity & Deposit Company of Maryland vs. Friedlander,* 101 Fed. (2d), 106:

> "Where in an insurance policy a term is open to two or more constructions we are required to adopt that one more favorable to the insured * * *. This is a just rule, because insurance policies are written by the insurers."

In this same opinion the Court cited with approval *Aschenbrenner vs. U. S. Fidelity & Guaranty Co.*, 292 U. S. 80, 54 Supreme Court, 590:

> "The phraseology of a contract of insurance is that chosen by the insurer and the contract, in fixed form, is tendered to the prospective policyholder, who is often without technical training and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions that more favorable to the assured will be adopted."

CONCLUSION.

The Circuit Court of Appeals departed from the established law of Ohio and its own decisions, and, without any basis in fact, construed language of an insurance policy in favor of an insurer instead of the party for whose benefit it was written,—in effect writing into the policy provisions that even the insurance company had omitted.

By far the more serious phase of the decision is that if it be allowed to stand it will lead to confusion in the law applicable to trucking companies and the uncertain protection afforded by their insurers. This will have a severely deterrent effect upon both trucking companies and shippers. This method of transportation, only comparatively recently taken under the supervision of the Interstate Commerce Commission, is presumably to be developed and encouraged, especially in these critical times, rather than stifled and discouraged by such adverse decisions.

We submit that the writ of certiorari ought to be granted and the record of the Sixth Circuit restored to conformity.

Respectfully submitted,

JOSEPH MCCORMACK,
GEORGE B. FOLK,
Counsel for Petitioner.